IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
WRIT PETITION NO.2963 OF 2006

Kabiruddin Allauddin Shaikh .... Petitioner
Vs.
Balu Matu Gaikwad & Ors. .... Respondents

Sarvasri G.W. Mattos with M.V. Deshmukh for the Petitioner.

Shri G.S. Godbole for the Respondent Nos.1 to 3.

CORAM: R.M.S. KHANDEPARKAR, J.

DATED: OCTOBER 06, 2006

P.C:

1. Heard. The petitioner challenges the order passed by the executing Court dismissing his obstructionist application. The challenge is on the ground that the executing Court failed to take into consideration the fact that the decree which was sought to be executed was a nullity in as much as that the decree holder landlord was not entitled to get eviction in terms of the provision of Section 13(1)(b) of the Bombay Rents, Hotel And Lodging House Rates (Control) Act, 1947, hereinafter called as "the Bombay Rent Act" as there was no notice issued by the tenant to the landlord which is a prerequisite for eviction of the tenant on the said ground and the same has been totally ignored by the executing Court while dismissing the obstructionist

application filed by the petitioner.

2. The contention is totally devoid of substance. It is to be noted that the objection to the execution of the decree was raised solely on the point that the petitioner is an independent tenant in respect of the suit premises and he was not party to the decree and, therefore, the decree cannot be executed against him. The petitioner utterly failed to establish his claim of tenancy in relation to the suit premises and therefore the application filed by the petitioner obstructing the execution of the decree has been dismissed. The point which is sought to be canvassed on the ground that the decree being a nullity was never raised by the obstructionist. In that regard, it is the contention on behalf of the petitioner that while setting aside the impugned order, the matter should be remanded to allow the petitioner to raise the said issue and to establish the same before the executing Court. Such a procedure is not known for being adopted in Article 227 proceedings. Once the petitioner fails to establish jurisdictional error on the part of the executing Court in passing the impugned order, question of interference therein in exercise of power under Article 227 of the Constitution of India does not arise. Besides, the main ground on which the decree is said to be a nullity is not a pure question of law but it is a mixed question of

law and facts. So as to establish non-compliance of the prerequisite of Section 13(1)(b) of the Bombay Rent Act in relation to service of the notice, it would be necessary to analyse the facts of the case to ascertain whether there was a service of notice by the tenant upon the landlord in terms of the said provision of law or not. Such an issue under no circumstances can be said to be a pure question of law. Besides, plain reading of the decree passed by the trial Court discloses a clear finding about compliance of the said requirement. Undoubtedly, the trial Court in that regard has referred to the agreement between the parties. Undisputedly, the said finding regarding the agreement between the parties had attained finality without there being any challenge to the said finding. It is not for the petitioner, therefore, to contend that there was no such notice by the tenant of the premises and that cannot be a ground in favour of the obstructionist to the execution of the decree, who is a stranger to the transaction between the parties.

3. The learned Advocate for the petitioner has drawn attention to the decision of the learned single Judge in **Mani Nariman Daruwala since deceased by his heirs Rusi Nariman Daruwala and others v. Phiroz N. Bhatena and others,** reported in 1991 Mh.L.J. 376. In the said decision, the learned single Judge has ruled that an

obstructionist is always entitled to contend that the decree is a nullity and, therefore, it is not executable. One fails to understand the relevancy of the said decision to the facts and circumstances of the case in hand and how it helps the petitioner to seek interference of this Court in the impugned order. The learned Advocate for the respondent has brought to my notice that the finding in relation to compliance of the requirements of the provisions of law to sustain the decree of eviction was even sought to be challenged before this Court, without any success. It is a matter of record that the lower Appellate Court had confirmed the rights of the landlord to get eviction in terms of the provision of law comprised under Section 13(1)(hh) and the tenant had sought to challenge the same before this Court, without any success.

4. For the reasons stated above, the petition is rejected.

5. At this stage, the learned Advocate for the petitioner prays for stay of execution of the decree for a period of six weeks which is objected to on behalf of the respondent. However, I am inclined to grant such a stay for a period of six weeks. Order accordingly, subject to that the petitioner shall not induct any third party nor create any third party interest in

respect of the suit premises.

(R.M.S. Khandeparkar, J.)

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